

U.S. Department of Labor

Office of Administrative Law Judges
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Date Issued: 9-26-01

BALCA Case No. 2000-INA-00290

ETA Case No. P1999-MD033

In the Matter of:

TRACEY AND ANDY FRIEDLANDER,

Employer,

on behalf of

MERCY ROBLES GALABIT,

Alien.

Certifying Officer: Richard E. Panati
Philadelphia, Pennsylvania

Appearance: Robert A. Remes, Esquire
Carliner, Remes & Mirbagheri-Smith, P.C.
Washington, D.C.
For Employers and Alien

Before: Burke, Chapman and Vittone
Administrative Law Judges

JOHN M. VITTONE

Chief Administrative Law Judge

DECISION AND ORDER

This case arises from Employers' request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5) of the Immigration and Naturalization Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under section 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor

certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of the application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

The decision is based on the record upon which the CO denied certification and Employers' request for review, as contained in the appeal file and any written arguments. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

Employers have filed an Application for *Alien Employment Certification* (ETA 750) to permit the employment of the Alien as a cook with the following duties:

Prepare and cook daily meals, brunches and snacks for a family of 5, plan menu, clean utensils, prepare party food for guests.

The hours of work were stated to be from 9:00 a.m. to 6:00 p.m. on Saturday and Sunday with a one hour lunch break and 8:30 a.m. to 10:00 a.m. and 11:30 a.m. to 5:30 p.m. Wednesday to Friday. (AF 22-25)

Following a report of unsuccessful recruitment efforts, the case was referred by the State agency to the CO. He then proceeded to issue a Notice of Findings (NOF) proposing to deny the application pursuant to section 656.20(c)(8) on the basis Employers had not established that the position of Domestic Cook in their household is a bona fide job opportunity which actually exists and is open to U.S. workers. (AF 17) Employers were instructed that to rebut this finding, they must, at a minimum, respond to the following 12 questions:

(1) State the number of meals prepared per day and per week; the length of time required to prepare these meals each day and each week; and the number of people for whom the meals are prepared.

(2) Provide the work and/or school schedules of all persons residing in the household.

(3) How frequently do you entertain? Describe in detail how often you entertained in the *twelve (12) calendar months* immediately preceding the filing of the application. List the dates of the entertainment, the number of guests entertained, the number of meals served, etc. To what extent will the Domestic Cook be involved in preparing food for guests?

(4) If there are pre-school or school aged children please answer the following questions:

- a. How will your child(ren) be cared for when both parents are absent from the home and the alien is fully engaged in preparing meals?
 - b. Who will care for your child(ren) during the alien's scheduled time off?
 - c. Will the alien be required to perform functions such as child care, general cleaning or other non-cooking functions? If not, how are those functions accomplished in the household?
- (5) Describe any special dietary circumstances of the household, e.g., nutritional requirements. All special dietary requirements must be accompanied by a physician's statement.
 - (6) What percentage of the employer's disposable income will be devoted to paying the alien's salary? Your answer must be supported by providing a copy of your Federal Income Tax Return for the immediately preceding calendar year.
 - (7) If there are other domestic workers employed in the household, please list all positions, duties, and corresponding weekly hours of employment.
 - (8) Has the household ever before employed a Domestic Cook? If not, what circumstances led to the current job offer?
 - (9) If applicable, when the alien was initially hired, what were the alien's duties and what wages were paid?
 - (10) What is the alien's training and experience as a Cook? To what extent has that training and experience involved cooking in a domestic situation?
 - (11) How did the alien learn of the job offer?
 - (12) What is the nature of the relationship between the alien and the employer (familial, friendship, or any other special connection)? (AF 12-18)

Employers responded to the NOF with answers to each of the above 12 questions and a copy of their 1998 Federal Income Tax Return. (AF 7-15) Employers represented that the Cook is required to prepare three meals per day plus snacks and that the dinner preparation involved more than one type of meal as some of the family members are vegetarians. The work schedule for Terry Friedlander was given as 7:00 a.m. to 4:30 p.m., Monday to Thursday; Andy Friedlander's schedule was given as 9:15 a.m. to 5:30 p.m. Monday to Friday; one child was in school from 8:00 a.m. to 3:05 p.m. Monday, Tuesday, Thursday and Friday and from 8:00 a.m. to 1:15 p.m. on Wednesday; a second child's school hours were given as 9:15 a.m. to 3:00 p.m., Monday to Friday; a third child was at school Monday, Wednesday and Friday 9:15 a.m. to 11:45

a.m. It was noted that the morning hours indicate time left home. (AF 9-11)

Employers answered question 4 above as follows:

- (a) We hire regular babysitters too, or our family members, help take care of the children when they are not in school or activities and we are not at home and the alien is engaged in preparing meals. We have an extended family in the area to help take care of the children, including both my husband's and my parents (the children's grandparents) and our siblings families.
- (b) We have regular babysitters and our parents and other family members (see above answer) to help take care of our children during the cook's time off.
- (c) The cook is required to perform other duties as well, including keeping a shopping list, shopping for food in regular and ethnic stores, planning the menus with me and cleaning kitchen utensils after use. The cook will not be required to perform general child-care, general cleaning or other functions not related to cooking. These functions will be taken care of by the family, babysitters and/or a cleaning person/company. (AF 10)

Employer's went on to state that approximately 12-15% of their net income will be devoted to paying the Cook's salary. In regard to the question referable to other employees in the household (#7), Employers responded that there will be regular sitters on a varied schedule to correspond to the children's requirements and a part-time driver to drive the children to and from school and to activities. When necessary, he or she will also drive the cook. A domestic cook has not been employed previously but is now necessary due to increased hours of employment, school age children, traveling, more entertainment, increased participation in charities and fund raising and the need to have family meals together now that the children are growing older. (AF 9-11)

After reviewing Employer' rebuttal, the CO issued a Final Determination denying the application for the following reasons:

The details you provided do not establish that there is a bona fide position for a Domestic Cook in your household. Rather, the evidence shows that it is more likely that the Alien will be employed as a General Houseworker than a Domestic Cook. Your rebuttal evidence does not show that the alien will be involved on a full-time basis preparing meals for family members to consume. All of the family members are outside the home working or attending school for the greater part of the Alien's daily work schedule. In fact two family members are at work and school before the alien even begins the workday; and the remaining three are at work and school 15 minutes after the workday begins, and likely leave before the aliens begins work due to travel time. While you entertain almost every weekend of the year, the evidence presented fails to establish that the entertaining responsibilities, along with daily cooking responsibilities described in your rebuttal equate to a full-time cooking position. Even though you have stated that in-laws

and ad-hoc baby sitters will care for your children when they are not in school, it seems apparent that the household employee (the ‘cook’) must also be involved in child care during the summer, school holidays and when no one else is available. In fact, the following statements in Item 4 of your rebuttal imply that the alien is, in fact, involved in providing child care in your home:

‘We hire regular babysitters too, or our family members help take care of the children when we are not at home and the **alien is engaged in preparing meals,**’ and ‘We have regular babysitters and our parents and other family members (see above answer) **to help take care of the children during the Cook’s time off**’ (emphasis added).

Similarly, we also find implausible your statement regarding the performance of housework. While you stated that housecleaning duties will be performed by a cleaning person/company, it seems apparent that the alien who is on the premises every day, must be involved in housecleaning during the week. It is not believable that the alien will be occupied solely in preparing meals for family members who are not there to eat them. Consequently, while the alien may cook some meals, it is implausible that the alien will be engaged as a full-time Domestic Cook because there is no one home to eat most of the meals that the alien supposedly will prepare and serve. (AF 4-6)

Employers requested a review of the denial of their application and the record has been submitted to the Board for such purpose. (AF 1-2)

FINDINGS AND CONCLUSION

In *Daisy Schimoler*, 1997-INA-218 (Mar. 3, 1999) (*en banc*) the Board stated:

We hold that the definition of employment in section 656.3 cannot be used to attack the employer’s need for the position [of household cook] by questioning the hours in which a worker will actually be engaged in work-related duties. Focusing solely on whether the employment will keep the worker substantially engaged throughout the day casts the problem in the wrong light – the true issue being whether the employer has a *bona fide* job opportunity. It also produces a degenerative analysis where an employer is placed in the position where it can only rebut trying to justify near an eight hour a day work schedule for a worker, and the CO is merely second guessing the employer’s justifications with assumptions about what a typical family needs in the way of cooking.

(Footnote omitted.)

And, in the companion case of *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*) we held:

Section 656.20 (c)(8) of the Department’s labor certification regulations require that the employer offer a *bona fide* job opportunity. *Bulk Farms v. Martin*, 963 F.2d (9th Cir. 1992);

Modular Container Systems, Inc., 89-INA-228 (July 16, 1991)(*en banc*). Whether a job opportunity is *bona fide* is gauged by a ‘totality of circumstances’ test. *Modular Container System, Inc.*, 89-INA-228, *supra*. When an employer presents a labor certification application for a ‘Domestic Cook’ attention immediately focuses on whether the application presents a *bona fide* job opportunity because common experience suggests that few households retain an employee whose only duties are to cook, or could even afford the luxury of retaining such an employee. The DOT contemplates that a domestic cook is a skilled, professional cook, and would be able to cook sophisticated meals, as illustrated by much higher requirement. Thus, such an application raises a question of whether the employer is really seeking a housekeeper, nanny, companion or other general household worker, or is attempting to create a job for the purpose of assisting the alien in immigrating to the United States. One motive for categorizing a job as a domestic cook rather than as another type of domestic worker is to avoid the long wait for a visa for an unskilled laborer under IMMACT 1990. If a labor certification application mischaracterizes the position offered, the job is not clearly open to U.S. workers in violation of section 656.20(c)(8), because the test of the labor market will be for higher-skilled domestic cooks rather than lower-paying domestic positions that include cooking duties. Thus, we conclude that the CO acts properly in invoking section 656.20(c)(8) when he or she suspects mischaracterization of the job.

(Footnotes omitted.)

The Board then went on to set out guidelines for a “factual circumstances” test that should be used when evaluating domestic cook applications. These included, but were not limited to, such factors as the percentage of the employer’s disposable income that will be devoted to paying the cook’s salary; whether the employee will be required to perform other functions, such as general cleaning; whether other domestic workers are employed; and whether the employer has retained domestic cooks in the past; what circumstances prompted the instant job offer; any special nutritional circumstances for the household; and the general indicia of the employer’s credibility or lack thereof.

Applied to the instant case, Employer appears to meet each factor favorably. Employer has documented a substantial annual salary that would certainly allow for this type of luxury. Employer stated in its rebuttal that it hires other domestic employees to take care of the children and clean the house, and it certainly is reasonable that a recent promotion would cause Employer to consider hiring a cook. This is especially true when both heads of the household are employed outside the home. Employer listed several special nutritional requirements in the rebuttal, and while a physician’s note documenting a need for this diet would have provided stronger evidence, the CO did not take issue with this in his Final Determination, so neither will this tribunal. Finally, Employer has shown no evidence of bad faith to cause this tribunal to question Employer’s credibility. All of these circumstances point to granting certification.

The CO’s Final Determination focuses partially on the number of hours the Alien Applicant will work. “Your rebuttal evidence does not show that the alien will be involved on a full-time basis preparing meals for family members to consume.” The Board in *Carlos Uy* noted

that a focus on whether the person occupying the position will be gainfully occupied for a substantial portion of the work day may overstate its importance as it is possible that some employers may be willing to pay a domestic cook a full-time salary even though that employee may not be gainfully occupied for a substantial portion of the day.

In analyzing Employers' rebuttal in the instant case, the CO has overlooked a very significant factor, *i.e.*, that the Alien's work week is from Wednesday to Sunday. He apparently has also overlooked the fact that Tracey does not work on Fridays and that Andy Friedlander and two of the children do not leave home on Wednesday, Thursday and Friday until 9:15 whereas the cook arrives on those days at 8:30 a.m. (AF 9) Consequently, the CO's finding that "[a]ll of the family members are outside the home working or attending school for the greater part of the alien's work schedule" is not supported by the evidence in this case. (AF 5-6)

The Alien's work schedule also renders the CO's findings, regarding her involvement in child care, to be speculative and unsupported. When the family's work schedule is compared to the Alien's there are only two days of the Alien's work week when both parents are away from the home, *i.e.*, Monday and Tuesday. Thus, it is apparent that Employers must be obtaining child care from sources other than the Alien—as they have maintained.¹

We conclude further that the CO's finding regarding housecleaning duties is without foundation. There is no evidence in this case to dispute Employers' representations that such services are provided by sources other than the Alien. Accordingly, we are unable to agree with the CO's finding that under the facts of this particular case, the job offer for a domestic cook is not a *bona fide* offer.

¹We note the portion of Employers' response emphasized by the CO in the Final Determination and agree with their counsel's contention that the question was not well phrased in the NOF and taking the totality of Employer's rebuttal, it is clear that they deny any involvement by the Alien in child care.

ORDER

It is hereby **ORDERED** that Employers' application for employment of the Alien as a household cook be **GRANTED**.

JOHN M. VITTON

Chief Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity in its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400
Washington, DC 20001-8002**

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.